

VIA Email: Becker.KC@epa.gov

December 14, 2021

KC Becker
Regional Administrator
EPA Region 8

RE: State of North Dakota Water Quality Standards review

Regional Administrator Becker,

I am writing to inquire on the status of Environmental Protection Agency's (EPA) review of North Dakota's revised Water Quality Standards (WQS) for mercury, which were submitted to EPA for approval on June 15, 2021. On November 30th, 2021, the North Dakota Department of Environmental Quality (DEQ) received approval of all the submitted WQS except for mercury, for which no action was taken. The DEQ believes this is in apparent violation of the Clean Water Act (CWA) and asks that EPA act to either approve or disapprove the Mercury WQS as required under the Act.

First, EPA has a nondiscretionary duty to either approve or disprove WQS within the time allowed under the Act.

33 U.S.C. § 1313(c)(3) states: *If the Administrator, within **sixty days** after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the **ninetieth day** after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the*

Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection. (Emphasis added.)

The WQS were submitted to EPA June 15th, 2021¹ so that at the time of this letter, over 180 days have passed, more than twice what is allowed under the Act. The DEQ expects EPA to fulfill its statutory duty and act on the submitted mercury criteria. As the proposed criteria is the same as EPA's own recommended criteria, little technical review should be needed now that EPA has determined the DEQ followed the required triennial review process.

Also, approval of the submitted mercury standard is the appropriate EPA action. As explained in our September 24, 2021 letter to Bert Garcia, when EPA does take the required action, it must be to approve North Dakota's mercury criteria as submitted. In adopting these criteria, the DEQ relied on EPA as the technical resource. North Dakota's criteria are equivalent to EPA's current recommend criteria for mercury, published by EPA in 1995. If EPA's criteria is in accordance with the act, so must be North Dakota's. If EPA's criteria is not, then why has it not been revised or withdrawn in the over 25 years since being published? By not taking action to approve or disprove the adoption of EPA's recommended criteria, it appears that EPA is attempting to circumvent the process for recommending water quality criteria outlined in 33 U.S.C. § 1314(a)(1), which states in part:

*The Administrator, after **consultation** with appropriate Federal and **State agencies** and **other interested persons**, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge. (Emphasis added.)*


Finally, the DEQ believes that the foundation of effective environmental protection is adherence to the science and the law, and is deeply troubled by EPA's apparent disregard of both in this case. First, by ignoring the law's requirements for a timely decision on approval of WQS, and second, by either ignoring their own scientifically based criteria, or conversely not updating their criteria using the best science available.

¹ According to EPA's 11/30/2021 letter the submission was received June 18th, 2021

This arbitrary action also causes uncertainty and inconsistencies between states. One state we contacted was not even aware their standard hadn't been acted on, due to staff turnover in the **12 years** since they submitted it. Another reported that EPA regional staff were still advising them that there would be no issues adopting EPA's recommended criteria. Over half of the states, and over a dozen tribes have mercury criteria equal to or greater than what North Dakota has proposed, yet they have no requirement to review or change those standards, creating a patchwork of criteria.

In summary, DEQ has met its obligations to provide a set of standards compliant with the 8 items under 40 C.F.R. § 131.5. We respectfully ask that EPA comply with 33 U.S.C. § 1313(c)(3) and approve the remaining Water Quality Standard for mercury without further delay. I look forward to discussing this with you at your earliest convenience, please contact me at 701.328.5150 with any questions.

Sincerely,


L. David Glatt (Dec 14, 2021 10:24 CST)

L. David Glatt, P.E
Director
NDDEQ

c: Margaret I. Olson, Assistant Attorney General (Via Email)
KC Schefski, EPA Regional Counsel (Via Email)
Deb Thomas, EPA Region 8, Deputy Regional Administrator (Via Email)
Bert Garcia, EPA Region 8 Water Division (Via Email)

EPAHgLtr20211207

Final Audit Report

2021-12-14

Created:	2021-12-14
By:	Joanie Sanda (jmsanda@nd.gov)
Status:	Signed
Transaction ID:	CBJCHBCAABAAV-plspB6Ex--XV66i0yAcD8wdyWoBijR

"EPAHgLtr20211207" History

-  Document created by Joanie Sanda (jmsanda@nd.gov)
2021-12-14 - 3:59:57 PM GMT- IP address: 165.234.248.32
-  Document emailed to L David Glatt (dglatt@nd.gov) for signature
2021-12-14 - 4:01:18 PM GMT
-  Email viewed by L David Glatt (dglatt@nd.gov)
2021-12-14 - 4:21:03 PM GMT- IP address: 174.202.231.229
-  Document e-signed by L David Glatt (dglatt@nd.gov)
Signature Date: 2021-12-14 - 4:24:31 PM GMT - Time Source: server- IP address: 174.202.231.229
-  Agreement completed.
2021-12-14 - 4:24:31 PM GMT